

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2623

PETITION OF LAI THI JACOBS

OPINION OF THE BOARD

(Opinion Adopted March 9, 2005)
(Effective Date of Opinion: April 14, 2005)

Case No. S-2623 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment.

The subject property is Lot 1, Block H, Seven Oaks Subdivision, located at 9313 Colesville Road, Silver Spring, Maryland, 20901, in the R-60 Zone.

On December 6, 2004 the Hearing Examiner held a hearing on the application, and on February 8, 2005, issued a Report and Recommendation for approval of the special exception.

Decision of the Board: Special Exception **Granted** Subject
To Conditions Enumerated Below.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on March 9, 2005. After careful consideration and a review of the record, the Board adopts the Report and Recommendation and **grants** the special exception subject to the following conditions:

1. The Petitioner is bound by her testimony and exhibits of record, including her testimony that she will allow her abutting neighbor to the west, Ms. Ellis, to have a new water line installed across Ms. Jacobs' property.
2. The Petitioner must install a dedicated circuit for bedroom and hall air conditioner or remove

3. The Petitioner must repair bedroom window lock (right window).
4. The Petitioner must repair or replace bedroom closet door.
5. The Petitioner must repair or replace left living room window to open and close properly.
6. The Petitioner must repair living room window lock.
7. The Petitioner must repair loose living room outlet.
8. The Petitioner must install guard/handrails on basement driveway retaining wall.
9. The Petitioner must remove mold/mildew from exterior.
10. The Petitioner must remove solid water in furnace room.
11. The accessory apartment may be inhabited by no more than two unrelated persons or a family of three persons.
12. Occupants of the accessory apartment must be limited, collectively, to no more than one vehicle.
13. Per Code § 59-G-2.00(b)(1), the Petitioner must occupy one of the dwelling units on the subject property.
14. Per Code § 59-G-2.00(b)(3), the Petitioner must not receive compensation for more than one dwelling unit on the subject property.
15. The accessory apartment may not be rented for a term of less than 12 months, except that after a tenant has completed a one-year term, renewals of the lease may be made for shorter periods, provided that there is no break in tenancy.

On a motion by Angelo M. Caputo, seconded by Wendell M. Holloway, with Donna L. Barron, Louise L. Mayer and Allison Ishihara Fultz, Chair in agreement the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 14th day of April, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:

LAI THI JACOBS,
Petitioners

S-2623

For the Petition

Alvin Clarkson, Jr.,
Housing Code Inspector
Department of Housing and
Community Affairs

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Board of Appeals Case No.

(OZAH Referral No. 05-09)

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

I. STATEMENT OF THE CASE

Petition No. S-2623, filed on July 26, 2004, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 9319 Colesville Road, Silver Spring. The subject property is designated as Part of Lot 1, Block H in the Seven Oaks Subdivision and is zoned R-60 (Residential, one-family detached) (Tax Account No. 01038510).

On August 16, 2004 the Board of Appeals scheduled a hearing in this matter for December 6, 2004, to be held by a Hearing Examiner with the Office of Zoning and Administrative Hearings.

Technical Staff at the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a memorandum dated December 1, 2004 (Exhibit 14), recommended approval of the petition with conditions.¹ The Department of Housing and Community Affairs ("DHCA") inspected the property on December 2, 2004, and set forth certain requirements for the granting of the requested special exception in a memorandum of the same date (Exhibit 15).

A public hearing was convened as scheduled on December 6, 2004 at which testimony was presented in favor of the petition by the Petitioner and DHCA staff and in opposition by an adjacent neighbor. The record was held open to receive supplemental submissions from DHCA and Technical Staff and closed on December 17. By Order dated January 20, 2005, the Hearing Examiner extended the time for submission of her report to February 8, 2005.

¹ The Staff Report is liberally quoted and paraphrased in Part II of this report.

II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property

The subject property is located at 9313 Colesville Road, Silver Spring, on the east side of Colesville Road (U.S. Rte. 29) between Franklin Road and Sligo Creek. The property is irregularly shaped and comprises approximately 9,111 square feet of land. It is developed with a two-story, brick dwelling with a basement, measuring 1,793 square feet. The building was originally constructed in 1923. The subject property has approximately 52.7 feet of frontage on Colesville Road to the northwest, and approximately 30 feet of frontage on Ellsworth Drive to the southeast. Vehicular access is from Ellsworth Drive via a gravel driveway in the rear of the house, which connects with a sloping, concrete drive that once led to a below-grade garage. The garage space has since been converted to living space. Pedestrian access is available from Colesville Road via a concrete walkway that extends from the street to the house, which connects with a stone walkway that extends from the front yard to the northern/eastern side yard, runs along the side of the house and then splits into two walkways, providing access to the rear entrance and the gravel driveway. The front yard and portions of the rear and side yards are landscaped with grass and various shrubs, ornamental trees and shade trees.

The photographs that follow show various aspects of the subject property.

Photograph of Front of House, Ex. 9(a)



**Photograph of Rear Yard and Stone Walkway
Excerpted from Staff Report, Ex. 14**



**Photograph of Back Patio and Separate Entrances to
Main Dwelling Unit (on left) and Accessory Apartment (on right)
Excerpted from Staff Report, Ex. 14**

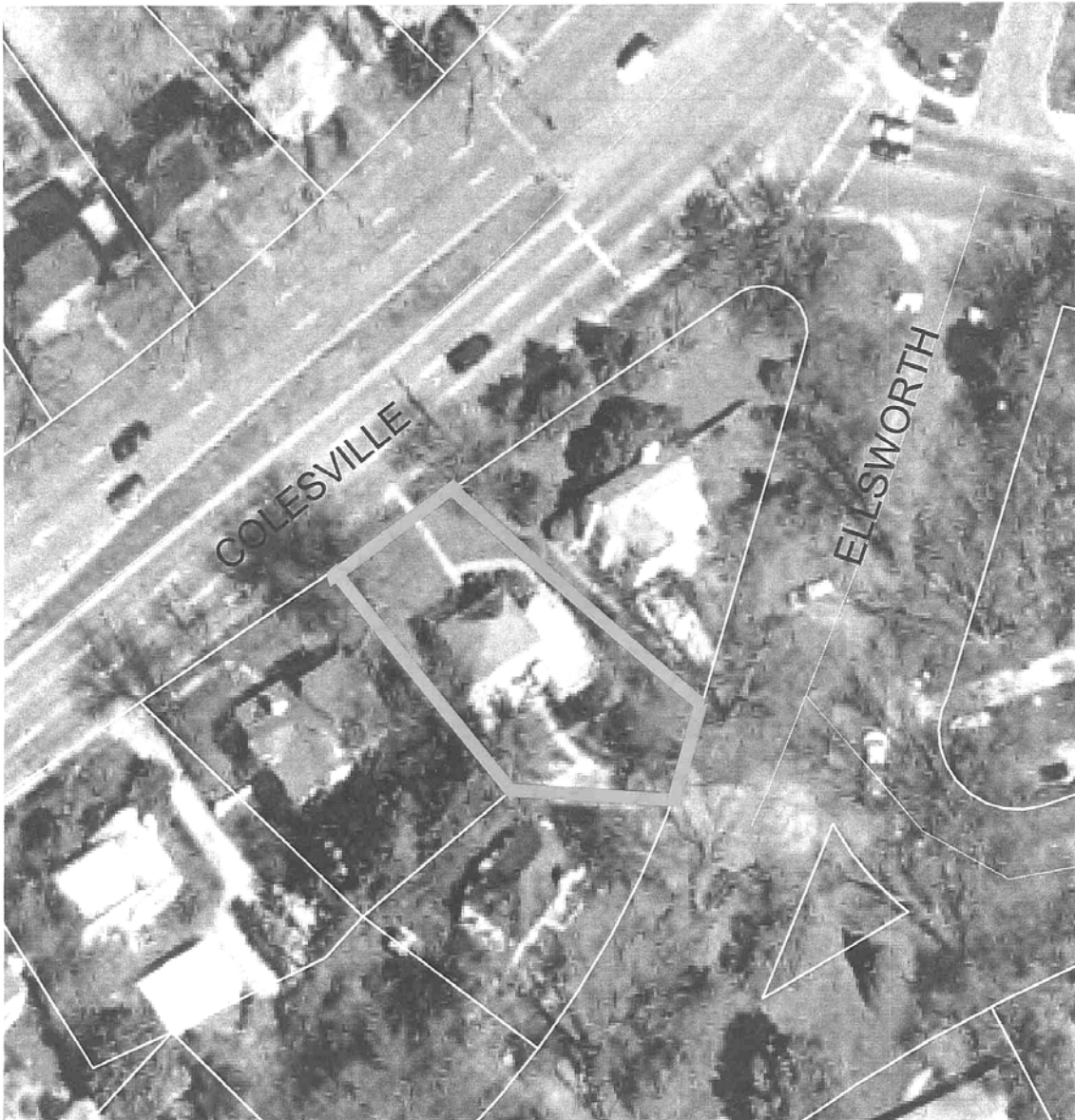


Photograph of Concrete Drive and Additional Entrance, Ex. 17



The location of the subject property relative to its neighbors may be seen below.

Aerial Photograph, Excerpted from Staff Report (Ex. 14)



The subject property is a through-lot, fronting on both Colesville Road and Ellsworth Drive. The site is adjacent to the southwest to two smaller lots, each of which is occupied by a single-family dwelling. The northern lot fronts on and has vehicular access to Colesville Road. The southern lot, owned and occupied by Elaine H. Ellis, fronts on and has access to Ellsworth Drive. Ms. Jacobs' gravel driveway shares a single opening onto Ellsworth Drive with Ms. Ellis' gravel drive. Ms. Ellis described the entrance area as a "shared drive," but Technical Staff and DHCA opined that a better characterization would be two gravel driveways that abut one another, without any demarcation, each of which is wide enough to provide vehicular access without using the other drive. In other words, vehicles coming to Ms. Jacobs' house can enter the site without using Ms. Ellis' driveway, and vehicles coming to Ms. Ellis' home can enter without using Ms. Jacobs' driveway. Nonetheless, the proximity of the two homes, the combined site layout and the lack of demarcation between the driveways increase the

likelihood that activities on Ms. Jacobs' property will have a noticeable impact on Ms. Ellis' property.

The photograph below shows the combined driveway entrance, with Ms. Ellis' drive on the left and Ms. Jacobs' on the right. The white van in the photograph belongs to Ms. Jacobs, and is parked essentially along her property line. A line drawn from the hedgerow immediately to the left of Ms. Jacobs' car to Ellsworth Drive would roughly represent the property line. Cars can park on Ms. Jacobs' property in several locations: where the van is parked in this photograph, on the concrete driveway, and along the right hand side of the gravel drive near the large tree in the foreground of this photograph. Ms. Ellis testified that on her property, cars can drive straight in and park to the left of the white van in this photograph, facing her house, or they can turn left as they enter the drive and park in front of her house, in a space to the left of the area show in this photograph.

Photograph of Driveway Entrance, excerpted from Ex. 28



The impacts of the open driveway configuration are discussed in more detail in a later section of this report.

The house location drawing below shows the location of the dwelling, pathways and driveways on the site.

House Location Plan, Ex. 4

The Neighborhood and its Character

Technical Staff defined the general neighborhood of the subject property as the area bounded generally by Colesville Avenue to the north, Sligo Creek to the southeast, Wayne Avenue to the south and Flower Avenue to the west, an area that has common geographical, physical and social characteristics. Staff considered Colesville Road (U.S. Rte. 29) to be a natural barrier delineating the relevant neighborhood because, at this location, it is a divided, six-lane major highway, and the houses fronting on it generally have no direct vehicular access to Colesville Road. See Ex. 29. The area covered by this general neighborhood description is larger than commonly used in an accessory apartment case, where the impacts of the proposed use are typically quite small. The Hearing Examiner will accept this description of the general neighborhood, but will refer to the immediate vicinity of the subject property when necessary.

The subject property abuts single-family dwellings to the northeast and southwest, Colesville Road to the northwest and Ellsworth Drive to the southeast. As may be seen on the map reproduced on the next page, the neighborhood is primarily residential. Highland View Elementary School is located in the southern portion of the neighborhood. Properties in the immediate vicinity of the subject site are classified under the R-60 Zone and developed with single-family detached houses. The southwest portion of the general neighborhood includes areas developed with townhouses under the R-T Zone and multi-family apartment buildings under the R-10 Zone.

C. Master Plan

The property is located within the area covered by August 2000 *Approved and Adopted North and West Silver Spring Master Plan* (the "Master Plan"). The Master Plan does not specifically address the subject property or accessory apartments, but it includes specific recommendations that are intended to maintain the residential character of the neighborhoods and minimize the impacts of potential special exception uses.

Neighborhood Vicinity Map, excerpted from Staff Report, Ex. 14



Technical Staff cites the following Master Plan recommendations:

- Apply increased scrutiny to the review of special exception applications for highly visible sites, such as properties located at corners of residential streets with major arterial highways, and residentially zoned properties adjacent to non-residential zones.
- Maintain a residential appearance where feasible
- Evaluate special exception uses in residentially zoned areas along major highways to minimize:
 - Non-residential appearance
 - Size and number of signs
 - Visibility and amount of parking
 - Traffic generation
 - Intrusive lighting

Technical Staff opined that the proposed accessory apartment use would be consistent with the Master Plan and compatible with the surrounding community.

D. Land Use and Occupancy History

The Petitioner and her late husband purchased the subject property in 1986. They lived on the premises until late 1992, at which point they moved to another State. Ms. Jacobs returned to the subject property almost two years before the hearing in this case. In the interim, the home was rented to various tenants, including a supervised shelter for homeless individuals. The owner of the adjacent home to the southwest, Ms. Ellis, testified that the problems began with the first tenants in the house, who were three single women with three cars. Ms. Ellis stated that Ms. Jacobs' tenants often parked in Ms. Ellis's parking space rather than having to shuffle three cars around in their driveway.

Ms. Ellis testified and submitted a written statement describing severe adverse impacts on her enjoyment of her home that occurred while Ms. Jacobs' home was used as a shelter. These included shelter employees parking on Ms. Ellis' property; having to call 911 when a shelter employee was assaulted by a male visitor in Ms. Ellis' driveway; and seeing a sea of strangers living in and visiting the house next door, some of whom knocked on Ms. Ellis's door late at night to ask directions to the shelter. Ms. Ellis estimates that between 50 and 75 different people lived in Ms. Jacobs' house while it was used as a homeless shelter. After several years of putting up with these intrusions on her home life, Ms. Ellis wrote a letter to the County Executive seeking assistance. Ms. Ellis testified that after the County Executive started making inquiries, the shelter decided not to renew its lease.

After Ms. Jacobs moved back to the subject property, she informed Ms. Ellis that she intended to rent out the patio apartment. Ms. Ellis testified that she saw contractors working in the basement for several months, and learned from them that a second apartment was being installed in the garage. Ms. Ellis stated that when she asked Ms. Jacobs about this, Ms. Jacobs indicated that she hoped to rent out both a basement apartment and a patio apartment, so the house would generate enough income to allow her to live there for free. Ms. Jacobs at the hearing testified that she intended to have a second rental unit in the basement. She stated that she abandoned that plan when she learned from the County that she would not be permitted to have two rental units. She was required to remove the stove from the unit that she had set up in the basement, so that it could not be used as a dwelling. This chain of events was confirmed by inspection reports and violation notices, as well as hearing testimony provided by DHCA inspector Alvin Clarkson.

Ms. Jacobs admitted that she rented out the apartment for which she now seeks special exception approval, illegally, for some period. Both Ms. Jacobs and Ms. Ellis testified that during this period, Ms. Jacobs had one particular tenant with whom she had serious problems, whom she ultimately evicted. Ms. Ellis stated that this problem tenant scratched the paint on her car, put a nail in her tire and put trash in her garbage can without her permission. (Ms. Jacobs contested this description, arguing that she does not believe her tenant did all those things.) Ms. Ellis added that it was very unpleasant to hear all the arguing between Ms. Jacobs and the problem tenant, and that she felt insecure in her home while he was living there, particularly during a period when Ms. Jacobs was not sleeping in the home because she was afraid of her tenant.

As I stated during the hearing, the undersigned suspects that the use of the subject property as a homeless shelter was not in compliance with the Zoning Ordinance. Had Ms. Ellis sought help from county authorities sooner, the ordeal of living next to a transient shelter in a location with close living conditions and no buffering might

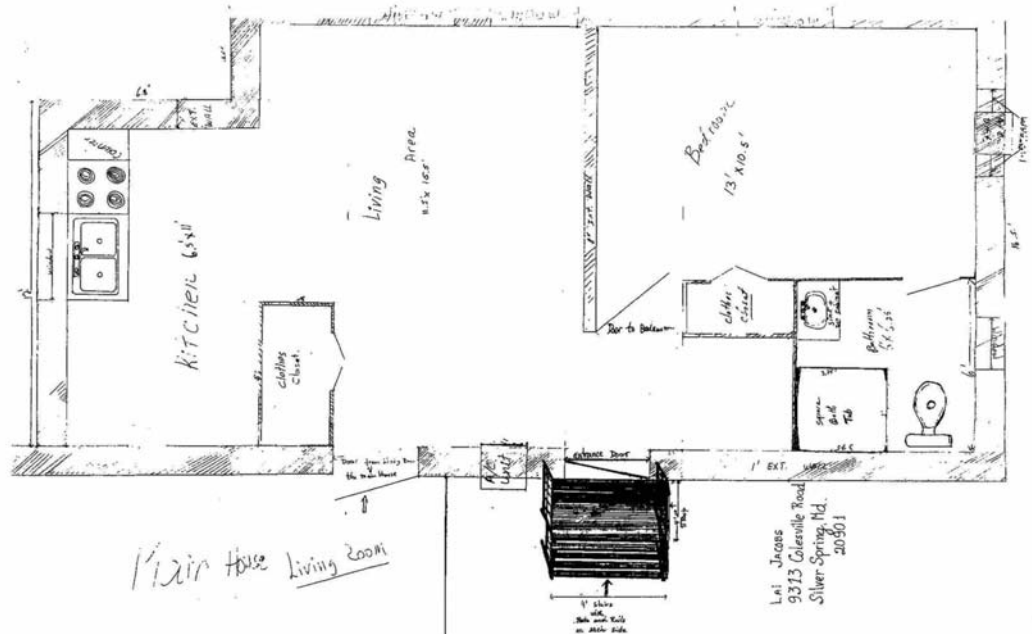
have ended much sooner. Past zoning violations do not normally play a direct role in considering a petition for a special exception. Each petition is evaluated, on its own merits, as to whether the proposed use satisfies the general and specific conditions established in the Zoning Ordinance. However, past zoning violations and other land use problems with negative impacts on neighbors are relevant to assessing the credibility of a petitioner who seeks permission for another use with the potential to adversely affect neighbors.

In the present case, uncontested evidence establishes that adverse effects were imposed on Ms. Ellis due to activities that Ms. Jacobs permitted in her home (renting to three individuals with three cars, and renting to a homeless shelter). Moreover, Ms. Jacobs admitted that but for Ms. Ellis's complaint to the County, Ms. Jacobs would currently be renting out not one, but two apartments in her home. This evidence of past actions outweighs Ms. Jacobs' earnest testimony during the hearing that neighbors are very important to her and she would not want to do anything to harm her neighbors. The Hearing Examiner is persuaded that while Ms. Jacobs may in theory wish to live harmoniously with her neighbors, in practice she cares more about how much income her home can generate than about how the neighbors are affected.

The Hearing Examiner does not believe that the evidence warrants an outright denial of the requested special exception, because the actual impacts, assessed objectively, would be fairly modest. However, the Hearing Examiner is persuaded that the circumstances present in this case justify imposing strict limits on the accessory apartment, to ensure that the effects remain modest.

E. Proposed Use

The Petitioner resides in the main dwelling unit on the subject property, comprised of the center section of the house, from basement to second story. The proposed accessory apartment is located in a single-story wing that is attached to the east side of the house. The apartment occupies approximately 540 square feet, or about 30 percent of the building. It contains one bedroom, one bathroom and combined living room/kitchen. The apartment is accessed by a door that leads to the rear patio of the house. It is currently vacant. A floor plan is shown below.



F. Parking

The adequacy of parking has been a major issue in this case. As discussed earlier, the driveways and parking areas behind the Jacobs and Ellis homes are contiguous, with no dividing line between them. As a result, it has been very easy for tenants in Ms. Jacobs' home to park on Ms. Ellis's property, depriving her of one of the most fundamental of property rights: the right to keep others off one's property. Technical Staff opined that the parking area available on Ms. Jacobs' lot is adequate to support an accessory apartment because as many as four cars could park on her property at one time – two towards the front of the lot and two towards the back. Ms. Ellis contends that four cars can fit on that lot only if two of them are partly in the public right-of-way at the edge of Ellsworth Drive. Neither Technical Staff nor DHCA commented on this, and it is impossible to tell from this record where the right-of-way line actually begins.

DHCA's Mr. Clarkson initially stated that there is room for four cars on the subject property. Later in the hearing, after reviewing several photographs of the parking area, Mr. Clarkson modified his opinion to state that four cars would be a very tight fit, and that two of them would have to be compact cars. The exact width of Ms. Jacobs' driveway and parking area was not provided, perhaps because the property line is not marked off.

Ms. Jacobs testified that she commonly parks her van at the top of the concrete driveway that leads to what used to be a garage, as shown in the photograph below (Ex. 18).



Ms. Ellis argues that a vehicle parked in the front of the site, at the top of the concrete drive, will not be able to exit if there is another vehicle parked at the back of the lot, because there will not be enough room to pass. She submitted the photograph below (Exhibit 22) to support her point:



Ms. Jacobs testified that in the photograph above, she parked where she did precisely because it left room for the truck in front of her to back out. The Hearing Examiner finds that based on the photograph, it appears that the truck might be able to back out between the two other vehicles, but it would be a very tight squeeze. Depending on the driver, he or she might ask Ms. Jacobs to move her van. This, however, is not sufficient reason to deny the requested special exception. Many accessory apartments have been approved where parking all the cars off-street may require jockeying the cars around at times.

In the view of the undersigned, the space constraints, the undemarcated driveways and the closeness of Ms. Ellis' dwelling to Ms. Jacobs' driveway support the imposition of a condition that would limit occupants of the accessory apartment to only one car. Ms. Jacobs did not unequivocally support the idea of such a limitation. She testified that she would prefer to rent to one individual, but she did not like the idea that she would be prohibited from renting to a couple with two cars. As the Board is aware, it has the authority to impose whatever conditions it finds necessary, with or without the Petitioner's consent. See Code § 59-G-1.22(a). In this case, given the history of the site and the physical limitations, the Hearing Examiner feels that imposing a limit of one car for the accessory apartment is fully justified as a means of reducing the likelihood of Ms. Jacobs' tenants parking on Ms. Ellis's property.

G. Water Service

Ms. Ellis testified that she has had severe water pressure problems in her home for a number of years. She has been informed by staff at the Washington Sewer and Sanitary Commission (WSSC) that fixing the problem would require a new water system. Ms. Ellis' current water system runs across Ms. Jacobs' property to tap into the water line on Colesville Avenue. Avoiding Ms. Jacobs' property would escalate the cost, so WSSC is reluctant to do it that way.

Ms. Ellis has two concerns about the accessory apartment and her water pressure problem. First, she expects that additional people living in Ms. Jacobs' home will further tax the water supply and exacerbate her water pressure problem. Second, Ms. Ellis states that Ms. Jacobs told her she would refuse to give her permission to have a new water line installed across Ms. Jacobs' property unless Ms. Ellis abandoned her

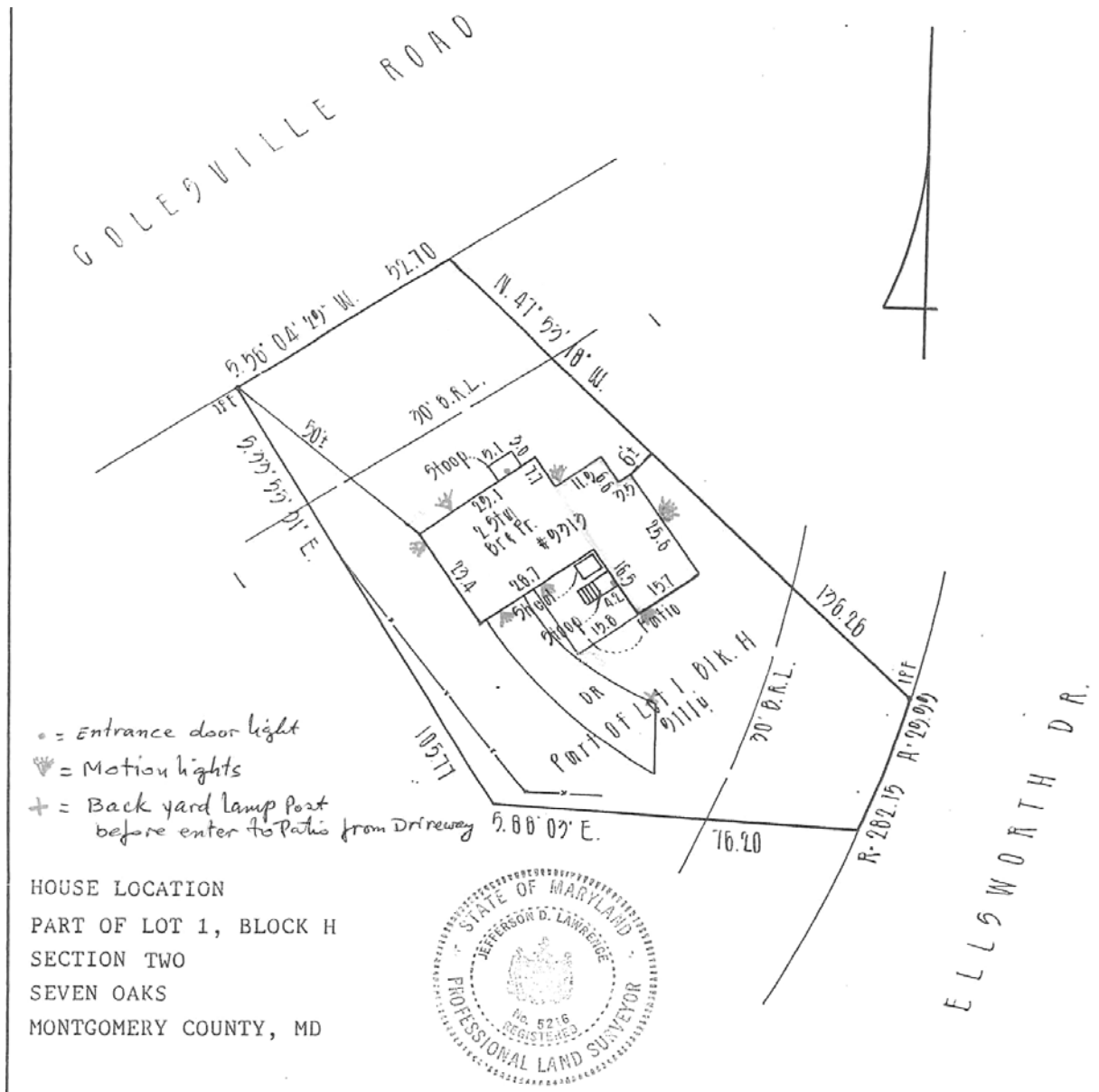
opposition to this application. Tr. at 36. Ms. Jacobs denies having said this, and explained that she did not understand what Ms. Ellis was asking, and thought she was just talking about the renters increasing the demands on the water system. It is apparent that Ms. Jacobs is not a native speaker of English. Nonetheless, the Hearing Examiner finds it hard to believe that Ms. Jacobs could have missed the point on this issue so entirely. Ms. Jacobs testified at the hearing that she will allow Ms. Ellis to have a new water line installed across Ms. Jacobs' property. Tr. at 48. The proposed conditions of approval include the standard condition that binds the Petitioner to his or her testimony. This condition has been enhanced to specifically refer to this promise.

The Hearing Examiner notes that with the proposed accessory apartment would be limited to no more than three occupants, and that the limit of one car makes it likely the number of occupants would be one or two. Even three people would not exceed the number of people who could be expected to live in the main dwelling on this site, which has over 1,300 square feet of space. Thus, the small accessory apartment seems unlikely to meaningfully tax the water system, particularly because Ms. Jacobs has now committed to allowing a new water line on her property.

H. Lighting and Landscaping

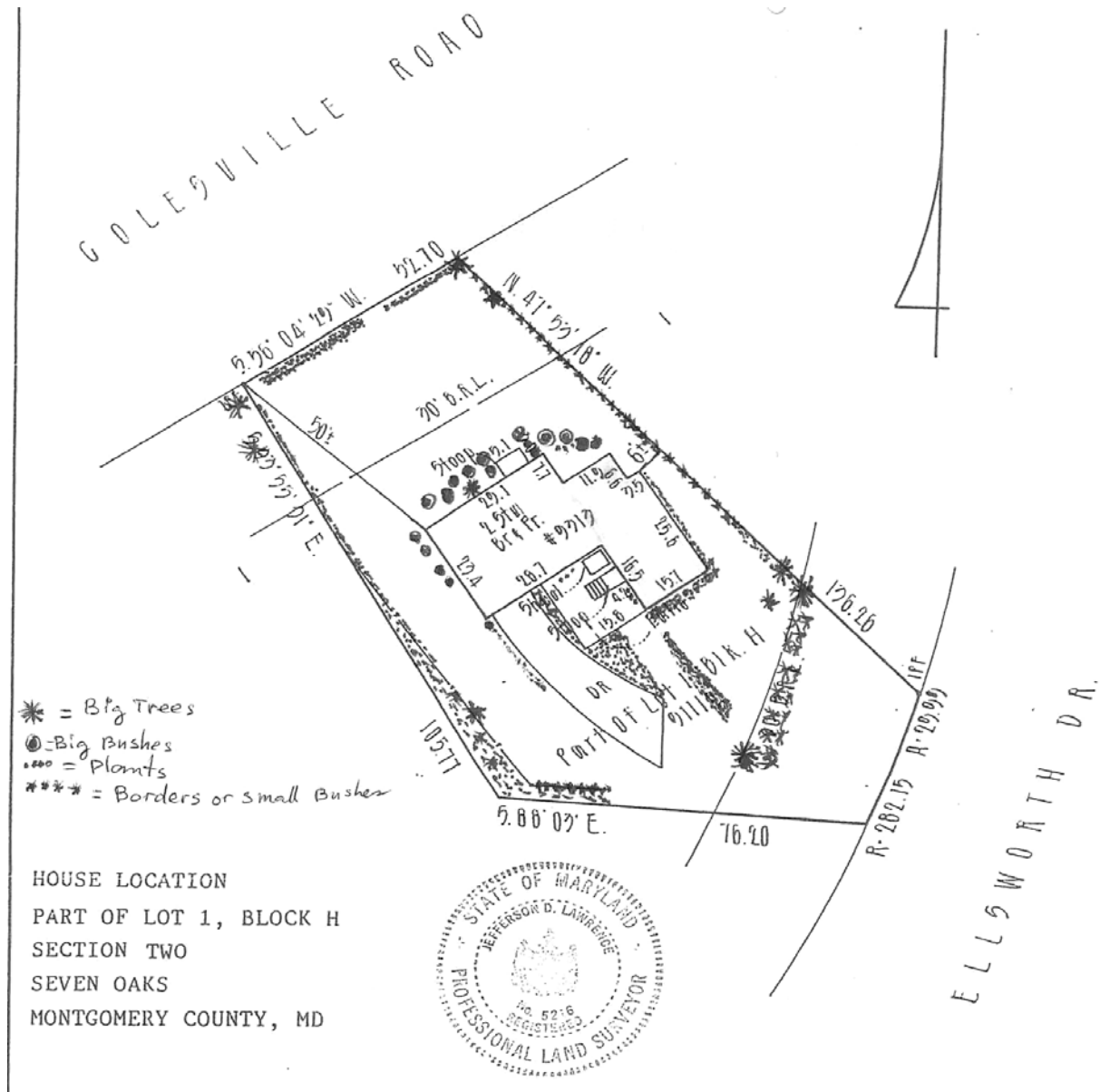
A copy of the house location plan identifying the location and type of exterior lights on the property is reproduced on the next page. Technical Staff opined that the exterior lighting is adequate for the use, and is provided in a manner that is not obtrusive.

Lighting Plan, Ex. 5(b)



A copy of the house location survey on which landscaping elements have been identified is reproduced on the next page. As may be seen on this plan and in several of the photographs provided earlier in this report, the subject property is nicely landscaped, but not in a manner that buffers Ms. Ellis from the sights and sounds of activity on the Jacobs property.

Landscape Plan, Ex. 5(a)



III. SUMMARY OF TESTIMONY

Alvin Clarkson, Jr., Housing Code Inspector for DHCA, testified at the hearing that, as noted in his inspection report (Ex. 15), the proposed accessory apartment is located in the left rear of the house and has approximately 417.5 square feet of habitable floor area. Based on the square footage of the apartment, occupancy is limited to two unrelated persons or a family of three. Mr. Clarkson also testified that in its current condition, the apartment fails to satisfy applicable standards in a number of respects. If the special exception is granted, the Petitioner will be required to make the following improvements before DHCA will issue a license (see Ex. 15):

1. Install dedicated circuit for bedroom and hall air conditioner or remove
2. Repair bedroom window lock (right window).
3. Repair or replace bedroom closet door.

4. Repair or replace left living room window to open and close properly.
5. Repair living room window lock.
6. Repair loose living room outlet.
7. Install guard/handrails on basement driveway retaining wall.
8. Remove mold/mildew from exterior.
9. Remove solid water in furnace room.

Mr. Clarkson characterized these as fairly minor repairs. He explained that the mold/mildew removal simply requires power washing the part of the house that is covered in siding. Ms. Jacobs stated that the trash in the furnace room was removed two days before the hearing. She stated that she is aware of the repairs DHCA requires, and understands that these items must be fixed, if the special exception is granted, before she can obtain a license for the unit from DHCA.

In response to questions from the Hearing Examiner, Mr. Clarkson explained that the violation notices in the record refer to steps that DHCA took to ensure that Ms. Jacobs will not use the basement as a dwelling unit. These include requiring Ms. Jacobs to remove the stove that she had installed in the basement.

Ms. Jacobs testified that she and her husband bought the subject property in 1986 and lived there until late 1992, and that she returned to live in the house alone, after her husband's passing, almost two years before the December 2004 hearing. She stated that she lives alone in the house right now, and she understands that if the accessory apartment is approved, the only people who will be allowed to live in the building will be the tenants in the accessory apartment, Ms. Jacobs herself and members of her family. Ms. Jacobs stated that she understands that if the accessory apartment is approved, she will not be permitted to rent out any other part of her house.

Ms. Jacobs confirmed that mail for tenants will come to the same address as the main house, and that she lives in the house full-time. She objected to the Hearing Examiner's suggestion that a condition could be imposed on the proposed special exception providing that it becomes invalid if Ms. Jacobs sells the house. Ms. Jacobs prefers to have the approval intact, as part of what she sells when she sells her house. She did agree to a condition that would require her to rent the apartment for a minimum term of 12 months, to provide Ms. Ellis with some protection from a series of transient residents. Tr. p. 63-64.

Ms. Ellis's testimony is described in detail in Part II of this report, so it will be summarized very briefly here. Ms. Ellis described past actions by tenants in Ms. Jacobs' home that had a negative impact on her, and expressed a fervent desire to have the home be nothing but a stable, one-family residence. She also described the size and configuration of the parking area, and offered her opinion that four cars cannot be parked on the site without hanging out into the public right-of-way. Ms. Ellis emphasized that because of the size and configuration of her lot, she lacks the degree of privacy that her neighbors enjoy, and is very much aware of all of the comings and goings on Ms. Jacobs' property.

Ms. Ellis stated that she has been reluctant to report a neighbor to government officials, but she is confident that if she had not filed a complaint with the County when Ms. Jacobs was having the basement apartment built, Ms. Jacobs would have had two apartments with illegal tenants.

Ms. Ellis also stressed that she loves her home and does not want to move. She stated that she was lucky she could afford the house when she bought it in 1983, and she could not afford to buy a house in today's real estate market. She plans to retire from the Federal government soon, and hopes to enjoy peace and quiet in her home.

Ms. Ellis testified about her water pressure problems, and the need for cooperation from Ms. Jacobs.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. The zoning statute establishes both general and specific standards for special exceptions, and the petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. The special exception is evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed special exception, with the conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed special exception that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed special exception that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff in this case identified the following as physical and operational characteristics necessarily associated with an accessory apartment: the existence of the apartment as a separate entity from the main living unit but sharing a party wall with it; the provision within the apartment of the necessary facilities, spaces and floor area to qualify as habitable space under the Building Code; a separate entrance and walkway and sufficient lighting; sufficient parking; the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic and parking activity; and the potential for additional noise.

Technical Staff identified no unusual physical or operational characteristics of the use or the site. The Hearing Examiner agrees with Technical Staff

that the proposed accessory apartment has no unusual physical or operational characteristics. However, the Hearing Examiner is persuaded that the configuration of the driveway and parking area on the subject property, contiguous to the driveway/parking area of the adjacent home to the west, is an unusual site characteristic. The openness of the two adjacent parking areas, the lack of any dividing line or any substantial buffer, and the location of the adjacent home relative to the parking area on the subject property are elements of this unusual site characteristic. Accordingly, the Hearing Examiner considers adverse effects created by the physical characteristics of the parking area to be non-inherent adverse effects. Nonetheless, for the reasons described in this report, the Hearing Examiner concludes that the inherent and non-inherent adverse effects of the proposed accessory apartment are not sufficient to warrant denial of the petition.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the DHCA inspection report, and the Petitioners' testimony and written submissions support a conclusion that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed special exception would comply with the standards and requirements set forth for the use in Code §59-G-2.00, as detailed in Part IV.C. below.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a

decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The evidence supports Technical Staff's finding that the proposed special exception would be consistent with the objectives of the *North and West Silver Spring Master Plan*. The Master Plan supports the existing zoning category, which allows such uses by special exception. Moreover, as a residential use involving no exterior changes to the property, the proposed accessory apartment would be consistent with the Master Plan's recommendations for special exceptions, which focus primarily on preserving residential appearance.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed special exception would be in harmony with the general character of the neighborhood considering the cited factors. It would have little impact on population density; it would not result in any changes to the exterior of the house; it would result in a modest increase in intensity of use of the property with no change in the character of such use; it would result in only a minimal increase in vehicular traffic; the site has adequate parking on-site if the accessory apartment tenant(s) is (are) limited to one care; and there are no special exception uses in the immediate neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence demonstrates that due to the modest impacts of the proposed accessory apartment, the special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, provided that it is operated in compliance with the recommended conditions of approval.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Based on the nature of the use and the typical residential exterior lighting, with the conditions of approval recommended at the close of this report, the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number,

intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: No existing special exceptions have been identified in the general neighborhood. The Hearing Examiner agrees with Technical Staff's conclusion that this single-family detached neighborhood can harmoniously accommodate the activity represented by the proposed special exception. Adding the accessory apartment proposed here would not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Moreover, given that the proposed use is residential in nature, it would be very unlikely to alter the predominantly residential nature of the area.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The Hearing Examiner accepts Technical Staff's conclusion that the proposed special exception would be adequately served by the specified public services and facilities, noting that one of the conditions of approval recommended in this case is a reminder that the Petitioner is bound by her testimony that she will permit her neighbor, Ms. Ellis, to have a new water line installed across Ms. Jacobs' property. This will ensure that the proposed accessory apartment does not exacerbate the water pressure problems Ms. Ellis has been experiencing.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: No subdivision approval would be required. Technical Staff reports that the proposed accessory apartment would generate one additional vehicle trip during the peak hours, far below the 30-trip threshold that triggers Local Area Transportation Review. The Hearing Examiner accepts Technical Staff's conclusion that this minimal amount of traffic can be accommodated by the existing road network in the neighborhood. Policy Area Transportation Review no longer applies.

- (ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The evidence of record supports the finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The memorandum submitted by DHCA (Ex. 15), the Staff Report (Ex. 14) and the Petitioners' testimony and written submissions provide sufficient evidence that the specific standards set forth in Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:
 - (i) The lot is 2 acres or more in size; and
 - (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.

Conclusion: The apartment is located in the first floor of the main dwelling and therefore the two units share a wall in common.

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.

Conclusion: No addition or extension of the main dwelling is proposed.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

Conclusion: The Petitioner estimated that the house was built in 1923 and the apartment was built in about 1978.

- (5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.

Conclusion: The Petitioner is currently the sole occupant of the dwelling, and understands that if the accessory apartment is approved, the only permitted occupants will be the tenants in the accessory apartment, the Petitioner and her family members.

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: The single-family appearance of the dwelling is unaffected by the entrance to the accessory apartment, which has the appearance of a back door.

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: No changes to the exterior of the building are currently planned in connection with this accessory apartment.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment is subordinate to the main dwelling, because the main unit is larger than the apartment. The proposed accessory apartment occupies approximately 540 square feet (about one third) of the dwelling, which has a total of 1,793 square feet of space.

59-G § 2.00(b) Ownership Requirements

(1) –The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: The Petitioner plans to live in the main dwelling unit permanently.

(2) – Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

Conclusion: The Petitioner testified that she and her late husband purchased the property in 1986. She submitted to Technical Staff a copy of a quitclaim deed dated October 1995, showing that she became the sole owner after her husband's passing. See attachment to Staff Report.

(3) Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.

Conclusion: The Petitioner will receive compensation for only one dwelling unit.

(4) For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.

Conclusion: The Petitioner is the owner of the property.

(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable

59-G § 2.00(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject lot is approximately 9,111 square feet in size.

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses,

including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: The fact that no one existing accessory apartments have been identified in the broadly defined neighborhood of the subject property supports the conclusion that this special exception, if granted, will not result in an excessive concentration of similar uses in the general neighborhood.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking;
or
- (ii) Adequate on-street parking permits fewer off-street spaces.

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: Based on the detailed analysis of parking availability provided in Part II above, the Hearing Examiner concludes that adequate parking is available on site, provided that the accessory apartment tenant(s) is (are) limited to one vehicle as provided in the recommended conditions of approval.

D. Additional Applicable Standards

In addition to complying with the zoning requirements set forth in Chapter 59-G, an accessory apartment must be approved for habitation by the Department of Housing and Community Affairs. In this case Mr. Clarkson, testifying for DHCA, found that the proposed accessory apartment will meet all current standards with the nine conditions specified on Exhibit 15 and on page 18 above. As noted, the Petitioner agreed to satisfy these conditions.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2623, for a special exception to permit an accessory apartment use in a single-family residential structure located at 9313 Colesville Road, Silver Spring, be GRANTED, with the following conditions:

16. The Petitioner is bound by her testimony and exhibits of record, including her testimony that she will allow her abutting neighbor to the west, Ms. Ellis, to have a new water line installed across Ms. Jacobs' property.

17. The Petitioner must install a dedicated circuit for bedroom and hall air conditioner or remove

18. The Petitioner must repair bedroom window lock (right window).

19. The Petitioner must repair or replace bedroom closet door.

20. The Petitioner must repair or replace left living room window to open and close properly.

21. The Petitioner must repair living room window lock.

22. The Petitioner must repair loose living room outlet.

23. The Petitioner must install guard/handrails on basement driveway retaining wall.

24. The Petitioner must remove mold/mildew from exterior.

25. The Petitioner must remove solid water in furnace room.

26. The accessory apartment may be inhabited by no more than two unrelated persons or a family of three persons.

27. Occupants of the accessory apartment must be limited, collectively, to no more than one vehicle.

28. Per Code § 59-G-2.00(b)(1), the Petitioner must occupy one of the dwelling units on the subject property.

29. Per Code § 59-G-2.00(b)(3), the Petitioner must not receive compensation for more than one dwelling unit on the subject property.

30. The accessory apartment may not be rented for a term of less than 12 months, except that after a tenant has completed a one-year term, renewals of the lease may be made for shorter periods, provided that there is no break in tenancy.

Dated: February 8, 2005

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner